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(February 10, 1999)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR parts 550, 551, 555, 560, 565, 585, 586, 587, and 588

Docket No. 98-25

AMENDMENTS TO REGULATIONS GOVERNING RESTRICTIVE
FOREIGN SHIPPING PRACTICES, AND NEW REGULATIONS
GOVERNING CONTROLLED CARRIERS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is revising and redesignating its regulations relating to section 19 of the Merchant Marine Act, 1920, section 13(b)(5) of the Shipping Act of 1984, and the Foreign Shipping Practices Act of 1988, and adding new regulations relating to section 9 of the Shipping Act of 1984, in order to incorporate certain amendments made by the Ocean Shipping Reform Act of 1998 as well as to clarify and reorganize existing regulations.

DATE: This rule is effective May 1, 1999.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

On December 4, 1998, the Federal Maritime Commission ("Commission") published a proposed rule to revise its regulations on restrictive foreign shipping practices and controlled carriers.

63 FR 67030. The proposed rule implemented changes made by the Ocean Shipping Reform Act of 1998, Public Law 105-258, 112 Stat. 1902 ("OSRA"), and also clarified existing regulations. Interested parties were given the opportunity to submit comments on the proposed rule. The Commission received four comments from industry groups and regulated entities.

The first comment received by the Commission is from the Council of European and Japanese National Shipowners' Associations ("CENSA"), which has three specific comments to the proposed rule. CENSA first addresses sections 550.102 and 550.301, which explicate the regulatory action that may be taken by the Commission in the event it finds foreign shipping practices to create conditions unfavorable to shipping. The proposed regulations indicate that the Commission may take action when it finds that "competitive methods, pricing practices or other practices" have created conditions unfavorable to shipping. This language tracks verbatim OSRA's changes to section 19(a) (2) (formerly section 19(1)(b)) of the Merchant Marine Act, 1920. CENSA fears that this provision expands the Commission's power over privately-operated shipping companies with respect to their commercial pricing practices. CENSA states that Organisation for Economic Cooperation and Development ("OECD") member nations have agreed to reach a uniform consensus as to the appropriate measures to be taken to address unfair or non-commercial practices. CENSA believes that such

issues must be taken up in inter-governmental fora rather than by the Commission. CENSA requests that the Commission state that it will not pursue any matter under section 19 of the Merchant Marine Act, 1920 regarding the pricing practices of owners or operators of vessels of a foreign country unless those practices have been shown to be otherwise in violation of the Shipping Act of 1984 ("1984 Act") .

CENSA's comment would have the Commission affirmatively abdicate its statutory responsibility to combat conditions unfavorable to shipping vested in it by Congress for the purpose of permitting other bodies, like the OECD, to establish uniform rules. By including in OSRA references to "pricing practices," Congress has bestowed upon the Commission the specific responsibility to review and retaliate against such practices where they create conditions unfavorable to shipping in the U.S. foreign trade. The Commission cannot disregard this duty; should Congress determine through legislation to defer to the OECD or some other such forum, then the Commission would change its approach accordingly. We note, moreover, that the addition of "pricing practices" to the statute is a clarification of existing law and authority, rather than an expansion of such. The Commission has long interpreted "pricing practices" to be included within the meaning of "practices" generally, and has on numerous occasions acted accordingly. The Commission has therefore determined not to

incorporate CENSA's comment into the final rule.

CEMSA then addresses section 560.2(c), in which the Commission proposed to eliminate the term "fighting ships" from its regulation, and substitute in its place language forbidding "below market pricing designed to exclude competition." CENSA states that the Commission's determination to eliminate the term "fighting ships" must be taken in concert with what CENSA views as the survival of the fighting ship concept, though not the term, in OSRA. CENSA argues that Congress did not intend to eliminate the concept of fighting ships, but instead meant to recognize current conditions in which predatory practices would often be undertaken by multiple ship combinations rather than by a single "fighting ship." CENSA points to section 10(b)(6) of the 1984 Act as amended by OSRA as evidence of the survival of the fighting ship concept. That section indicates that "[n]o common carrier, either alone or in conjunction with any other person, directly or indirectly, may use a vessel or vessels in a particular trade for the purpose of excluding, preventing, or reducing competition, by driving another ocean common carrier out of that trade." Prior to the enactment of OSRA, the section (previously designated as section 10(b)(7)) indicated that "[n]o common carrier, either alone or in conjunction with any other person, directly or indirectly, may employ a fighting ship." CENSA argues that the replacement of the term "fighting ship" reflects a refinement of the concept. CENSA fears

that the proposed regulation proffered by the Commission is too vague and could lead to an overly broad interpretation to the detriment of competitive pricing mechanisms. For this reason, CENSA proposes that the Commission include the language from section 10(b)(6) in place of the term "fighting ship" in 46 CFR 560.2(c).

The deletion of the term "fighting ship" from section 560.2(c) was undertaken to reflect the deletion of that term from the 1984 Act. However, the definition of "predatory practices" in section 560.2(c), as CENSA has made clear, should continue to include the concept of a reduction in competition through the use of pricing mechanisms designed to push a common carrier out of a particular trade. The section as proposed indicated that predatory practices may be but are not limited to below cost pricing and the use of closed conferences employing deferred rebates. Other actions or practices may very well fall into the definition of "predatory practices," as the list is not exhaustive. However, CENSA's comment in this regard does serve to clarify and refine the concept the Commission attempted to propose in section 560.2(c); accordingly, the Commission has determined to amend section 560.2(c) to read as follows:

(c) Use of predatory practices, possibly including but not limited to the use of a vessel or vessels in a particular trade for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade, and closed conferences employing deferred rebates, which unduly impair access of a U.S. flag vessel to the trade.

Finally, CENSA addresses section 560.7(b)(3)(i), in which the Commission proposed to include the suspension of service contracts as a possible remedy to address restrictive foreign shipping practices under section 13(b)(6) of the 1984 Act. CENSA argues that OSRA did not amend section 13(b)(6) of the 1984 Act to include the suspension of service contracts, although it did amend other sections of the Act to reflect this penalty.

CENSA is mistaken. The Foreign Shipping Practices Act of 1988 ("FSPA") as amended by OSRA indicates that "the actions against foreign carriers authorized in subsections (e) and (f) . . . may be used in the administration and enforcement of section 13(b)(6) of the Shipping Act of 1984." See subsection 11a(h). The actions in subsections (e) and (f) include, at subsection (e)(1)(B), "suspension, in whole or in part, of any or all tariffs and service contracts." The suspension of service contracts is authorized by OSRA's modification to the FSPA, and is correctly included in section 560.7(b)(3) (i).

The second comment is from the National Industrial Transportation League ("NITL"), a shipper organization. The comment examines redesignated part 560, which implements section 13(b)(6) of the Shipping Act of 1984, as revised (and renumbered - it was formerly section 13(b)(5)) by OSRA. The comment specifically addresses section 560.2(c), in which the Commission proposed to amend its regulations relating to "predatory practices"

by including in the description of such practices the definition "possibly including but not limited to below market pricing designed to exclude competition." NITL states that this amendment is not necessitated by OSRA, is vague, and is not supported by well-developed law. NITL states that it is concerned that the precedent established by this proposed rule, if implemented, could be used in ~~other~~ contexts, like claims under section 10 of the 1984 Act, and that such usage would be inappropriate.

NITL argues that case law indicates that the term "predatory practices" is taken to mean pricing activity below costs, not below market pricing, citing inter alia Brooke Group, Ltd. v. Brown and Williamson Tobacco Corp., 509 U.S. 209 (1993). NITL concludes that the reference to "below market pricing designed to exclude competition" should be eliminated.

As explained above, in response to CENSA's comment, section 560.2(c) has been amended to remove the reference to "below market pricing." For this reason, NITL's concerns with the use of the "below market" language appear to have been mooted. Accordingly, no further change in the amended rule is necessitated.

The third comment received by the Commission is from the China Ocean Shipping Company ("COSCO"). COSCO notes that OSRA has eliminated several exceptions to the Commission's controlled carrier program, which elimination will have the effect of imposing on COSCO controlled carrier regulations in the trade between the

U.S. and China from which it was previously exempt. COSCO further states that it should not be considered a controlled carrier, as it allegedly does not receive any allocations or subsidies from the Chinese government.

COSCO's comments are in the nature of a policy-based objection to the scope of the controlled carrier provisions, and Congress's deletion of certain exceptions. Therefore, no changes to the rule are warranted by COSCO's comments.

The final comment received by the Commission is from Fruit Shippers Ltd. This comment, captioned as a response to Docket No. 98-25, in fact addresses issues as to the definition of "common carrier" in sections 514.2 and 572.104(f), which were raised in Docket No. 98-29, 63 FR 70368. Because the comment relates only to those sections, and does not address any of the issues in this docket, the Commission will consider the comment in the context of that proceeding.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking because the proposed changes affect vessel-operating common carriers, entities that are not considered to be small. The

comments received did not dispute the Commission's intention to certify; therefore, the certification is continued.

This regulatory action is not a "major" rule under 5 U.S.C. 804(2).

List of subjects

46 CFR part 585 and 550

Administrative practice and procedure, Maritime carriers.

46 CFR part 586 and 551

Japan, Maritime carriers.

46 CFR part 5812 and 560

Administrative practice and procedure, Maritime carriers.

46 CFR part 588 and 555

Administrative practice and procedure, Investigations, Maritime carriers.

46 CFR part 565

Administrative practice and procedure, Maritime carriers, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Commission amends 46 CFR parts 585, 586, 587, and 588, and adds new part 565, as set forth below:

1. Revise the title of subchapter C to read:

SUBCHAPTER C - - REGULATIONS AND ACTIONS TO ADDRESS RESTRICTIVE
FOREIGN MARITIME PRACTICES

PART 585 - - REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE
TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

1. Redesignate part 585 as part 550, and transfer newly designated:
part 550 to Subchapter C.

2. The authority citation for redesignated part 550 is revised to
read as set forth below:

Authority: 5 U.S.C. 553; sec. 19(a)(2), (e),(f),(g),(h),(i),(j),(k)
and (l) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(a)(2),
(e),(f),(g),(h),(i),(j),(k) and (l), as amended by Pub. L. No. 105-
258; Reorganization Plan No. 7 of 1961, 75 Stat 840; and sec. 10002
of the Foreign Shipping Practices Act of 1988, 46 U.S.C. app.
1710a.

2A. Add a note to newly designated Part 550 to read as follows:

Note to Part 550: In accordance with 44 U.S.C. 3518(c)(1)(B), and
except for investigations undertaken with reference to a category
of individuals or entities (e.g., an entire industry), any
information requests or requirements in 46 CFR part 550 are not
subject to the requirements of section 3507 of the Paperwork
Reduction Act because such collections of information are pursuant
to a civil, administrative action or investigation by an agency of-

the United States against specific individuals or entities.

3. Revise redesignated section 550.102 to read as set forth below:

§ 550.102 Scone.

Regulatory actions may be taken when the Commission finds, on its own motion or upon petition, that a foreign government has promulgated and enforced or intends to enforce laws, decrees, regulations or the like, or has engaged in or intends to engage in practices which presently have or prospectively could create conditions unfavorable to shipping in the foreign trade of the United States, or when owners, operators, agents or masters of foreign vessels engage in or intend to engage in competitive methods, pricing practices or other practices which have created or could create such conditions.

4. Revise redesignated section 550.103(a) and (b) to read as set forth below:

§ 550.163 Definitions

* * * * *

(a) Act means the Merchant Marine Act, 1920, as amended by Pub. L. No. 101-595 and as amended by Pub. L. No. 105-258.

(b) Person means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country, and includes any common carrier, tramp operator, bulk operator, shipper, shippers' association,

importer, exporter, consignee, ocean transportation intermediary, marine terminal operator, or any component of the Government of the United States.

* * * * *

5. Revise redesignated section 550.201(a) to read as set forth below:

§ 550.201 Information orders.

* * * * *

(a) The Commission may, by order, require any person (including any common carrier, tramp operator, bulk operator, shipper, shippers' association, ocean transportation intermediary, or marine terminal operator, or any officer, receiver, trustee, lessee, agent, or employee thereof), to file with the Commission a report, answers to questions, documentary material, or other information which the Commission considers necessary or appropriate;

* * * * *

6. Revise redesignated section 550.202(b) introductory text and (b)(3) to read as set forth below:

§ 550.202 Type of Information

* * * * *

(b) Shipper, shippers' association, or ocean transportation intermediary in the affected trade to furnish any or all of the

following information:

(1) * * *

(2) * * *

(3) Amount of brokerage, ocean transportation intermediary compensation or other charges collected or paid in connection with shipments in the affected trade; and

* * * * *

7. Revise the introductory text and paragraph (d) of redesignated section 550.301 to read as set forth below:

\$ 550.301 Findings.

For the purposes of this part, conditions created by foreign governmental action or competitive methods, pricing practices or other practices, of owners, operators, agents or masters of foreign vessels are found unfavorable to shipping in the foreign trade of the United States, if such conditions:

* * * * *

(d) Restrict or burden a carrier's intermodal movements or shore-based maritime activities, including terminal operations and cargo solicitation; agency services; ocean transportation intermediary services and operations; or other activities and services integral to transportation systems; or

* * * * *

8. Revise redesignated section 550.601(c) to read as set forth

below:

§ 550.601 Actions to correct unfavorable conditions.

* * * * *

(c) Suspend, in whole or in part, tariffs and service contracts for carriage to or from United States ports, including a common carrier's right to use tariffs of conferences and service contracts of agreements in United States trades of which it is a member for any period the Commission specifies;

* * * * *

9. Revise redesignated section 550.602 to read as set forth below:

§ 550.602 Penalty.

A common oarrier that accepts or handles cargo for carriage under a tariff or service contract that has been suspended under § 550.505 or § 550.601 of this part, or after its right to use another tariff or service contract has been suspended under those sections, is subject to a civil penalty of not more than \$50,000 for each day that it is found to be operating under a suspended tariff or service contract.

PART 586 - ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE
TO SHIPPING IN THE U.S. FOREIGN TRADE

1. Redesignate part 586 as part 551, and transfer newly designated

part 551 to Subchapter C.

2. The authority citation for redesignated part 551 is revised to read as set forth below:

Authority: 46 U.S.C. app. 876(1)(b); 46 U.S.C. app. 876(5) through (12); 46 CFR part 550; Reorganization Plan No. 7 of 1961, 26 FR 7315 (August 12, 1961).

2A. Add a note to newly designated Part 551 to read as follows:

Note to Part 551: In accordance with 44 U.S.C. 3518(c)(1)(B), and except for investigations undertaken with reference to a category of individuals or entities (e.g., an entire industry), any information requests or requirements in 46 CFR part 551 are not subject to the requirements of section 3507 of the Paperwork Reduction Act because such collections of information are pursuant to a civil, administrative action or investigation by an agency of the United States against specific individuals or entities.

3. Redesignated section 551.3 is removed.

PART 587 - ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING

ACCESS OF U.S. -FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

1. Redesignate part 587 as part 560, and transfer newly designated part 560 to Subchapter C.

2. The authority citation for redesignated part 560 is revised to

read as set forth below:

Authority: 5 U.S.C. 553; secs. 13(b)(6), 15 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1712(b)(6), 1714, and 1716, as amended by Pub. L. No. 105-258; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a), as amended by Pub. L. No. 105-258.

3. Revise redesignated section 560.1(a) to read as set forth below:

§ 560.1 Purpose; aeneral provisions.

(a)(1) It is the purpose of this part to enumerate certain conditions resulting from the action of a common carrier, acting alone or in concert with any person, or a foreign government, which unduly impair the access of a vessel documented under the laws of the United States whether liner, bulk, tramp or other vessel, (hereinafter "U.S. flag vessel") to ocean trade between foreign ports, which includes intermodal movements, and to establish procedures by which the owner or operator of a U.S. flag vessel (hereinafter "U.S. flag carrier") may petition the Federal Maritime Commission for relief under the authority of section 13(b)(6) of the Shipping Act of 1984 ("the Act") (46 U.S.C. app. 1712(b)(6)).

(2) It is the further purpose of this part to indicate the general circumstances under which the authority granted to the Commission under section 13(b)(6) may be invoked, and the nature of

the subsequent actions contemplated by the Commission.

(3) This part also furthers the goals of the Act with respect to encouraging the development of an economically sound and efficient U.S. flag liner fleet as stated in section 2 of the Act (46 U.S.C. app. 1701).

* * * * *

4. Revise redesignated section 560.2(c) to read as set forth below:

§ 560.2 Factors indicating conditions unduly impairing access.

* * * * *

(c) Use of predatory practices, possibly including but not limited to the use of a vessel or vessels in a particular trade for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade, and closed conferences employing deferred rebates, which unduly impair access of a U.S. flag vessel to the trade.

* * * * *

5. Revise the first sentence of the introductory text of redesignated section 560.5(a) to read as set forth below:

§ 560.5 Receipt of relevant information.

(a) In making its decision on matters arising under section 13(b)(6) of the Act, the Commission may receive and consider

relevant information from any owner, operator, or conference in an affected trade, or from any foreign government, either directly or through the Department of State or from any other reliable source.

* * *

* * * * *

6. Revise redesignated section 560.7(b)(3) (i) to read as set forth below:

\$ 560.7 Decision; sanctions; effective date.


* * * * *

(b) * * *

(3) (i) Suspension, in whole or in part, of any or all tariffs: or service contracts for carriage to or from United States ports for any period the Commission specifies, or until such time as unimpaired access is secured for U.S. flag carriers in the affected, trade.

* * * * *

PART 588 -- ACTIONS TO ADDRESS ADVERSE CONDITIONS AFFECTING U.S.:
FLAG CARRIERS THAT DO NOT EXIST FOR FOREIGN CARRIERS IN THE UNITED:
STATES

 Redesignate part 588 as part 555, and transfer newly designated part 555 to Subchapter C.

2. The authority citation for redesignated part 555 is revised to read as set forth below:

Authority: 5 U.S.C. 553; sec. 10002 of the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a), as amended by Pub. L. No. 105-258.

2A. Add a note to newly designated Part 555 to read as follows:

Note to Part 55-5: In accordance with 44 U.S.C. 3518(c)(1)(B), and except for investigations undertaken with reference to a category of individuals or entities (e.g., an entire industry), any information requests or requirements in 46 CFR part 555 are not subject to the requirements of section 3507 of the Paperwork Reduction Act because such collections of information are pursuant to a civil, administrative action or investigation by an agency of the United States against specific individuals or entities.

3. Revise redesignated section 555.1 to read as set forth below:

555.1 Purpose.

It is the purpose of the regulations of this part to establish procedures to implement the Foreign Shipping Practices Act of 1988, as amended by the Ocean Shipping Reform Act of 1998, which authorizes the Commission to take action against foreign carriers, whose practices- or whose government's practices result in adverse conditions affecting the operations of United States carriers, which adverse conditions do not exist for those foreign carriers in

the United States. The regulations of this part provide procedures for investigating such practices and for obtaining information relevant to the investigations, and also afford notice of the types of actions included among those that the Commission is authorized to take.

4. Revise redesignated section 555.2(a), (c), and (d) to read as set forth below:

§ 555.2 Definitions.

* * * * *

(a) "Common carrier," "marine terminal operator," "ocean transportation intermediary," "ocean common carrier," "person," "shipper," "shippers' association," and "United States" have the meanings given each such term, respectively, in section 3 of the Shipping Act of 1984 (46 U.S.C. app. 1702);

* * * * *

(c) "Maritime services" means port-to-port carriage of cargo by the vessels operated by ocean common carriers;

(d) "Maritime-related services" means intermodal operations, terminal operations, cargo solicitation, agency services, ocean transportation intermediary services and operations, and all other activities and services integral to total transportation systems of ocean common carriers and their foreign domiciled affiliates on their own and others' behalf;

* * * * *

5. Revise redesignated section 555.4(a) and (c) to read as set forth below:

§ 555.4 Petitions.

(a) A petition for investigation to determine the existence of adverse conditions as described in 555.3 may be submitted by any person, including any common carrier, shipper, shippers' association, ocean transportation intermediary, or marine terminal operator, or any branch, department, agency, or other component of the Government of the United States. Petitions for relief under this part shall be in writing, and filed in the form of an original and fifteen copies with the Secretary, Federal Maritime Commission, Washington, DC 20573.

* * * * *

(c) A petition which the Commission determines fails to comply substantially with the requirements of paragraph (b) of this section shall be rejected promptly and the person filing the petition shall be notified of the reasons for such rejection. Rejection is without prejudice to the filing of an amended petition.

6. Revise redesignated section 555.8 (a)(2) to read as set forth below:

§ 555.8 Action against foreign carriers.

(a) * * *

(2) Suspension, in whole or in part, of any or all tariffs or service contracts, including the right of an ocean common carrier to use any or all tariffs or service contracts of conferences in United States trades of which it is a member for such period as the Commission specifies;

* * * * *

PART 565 -- CONTROLLED CARRIERS

1. Add part 565 to subchapter C to read as set forth below:

PART 565 - CONTROLLED CARRIERS

Sec.

- 565.1 Purpose and scope.
- 565.2 Definitions.
- 565.3 Classification as controlled carrier.
- 565.4 Notification to Commission of change in control.
- 565.5 Exceptions.
- 565.6 Level of rates and charges generally.
- 565.7 Effective dates.
- 565.8 Special permission.
- 565.9 Commission review, suspension and prohibition of rates, charges, classifications, rules or regulations.
- 565.10 Suspension procedures, period and replacement rates.
- 565.11 Presidential review.
- 565.12 Stay, postponement, discontinuance or suspension of action.
- 565.13 OMB control number assigned pursuant to the Paperwork Reduction Act

AUTHORITY: 46 U.S.C. App. 1708, as amended by Pub. L. No. 105-258.

A 565.1 Purpose and Scope.

(a) Purpose. The regulations of this part are intended to carry out the Commission's mandate under section 9 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, to monitor the practices of controlled carriers and ensure that they do not:

(1) maintain rates or charges in their tariffs and service contracts that are below a level that is just and reasonable; nor

(2) establish, maintain or enforce unjust or unreasonable classifications, rules or regulations in those tariffs or service contracts which result or are likely to result in the carriage or handling of cargo at rates or charges that are below a just and reasonable level.

(b) Scope. The regulations contained in this part set forth the special procedures whereby controlled carriers' tariffs and service contracts become effective and are reviewed by the Commission. These regulations in no way exempt controlled carriers from other Commission regulations or statutory authority to which they may otherwise be subject as ocean common carriers. These regulations apply to all controlled carriers operating in the foreign commerce of the United States unless excepted under section 9(f) of the Shipping Act of 1984, as reflected by § 565.5.

§ 565.2 Definitions.

(a) Controlled carrier means an ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by a government. Ownership or control by a government shall be deemed to exist with respect to any ocean common carrier if:

(1) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the carrier.

(b) Effective date has the same meaning it has in 46 CFR part 520.

§ 565.3 Classification as controlled carrier.

(a) Notification. The Commission will periodically review the ocean common carriers operating in the foreign commerce of the United States and will notify any ocean common carrier of any change in its classification as a controlled carrier.

(b) Rebuttal of classification. (1) Any ocean common carrier contesting such a classification may, within 30 days after the date of the Commission's notice, submit a rebuttal statement.

(2) The Commission shall review the rebuttal and notify the

ocean common carrier of its final decision.

§ 565.4 Notification to Commission of change in control.

Whenever the operation, control or ownership of an ocean common carrier is transferred resulting in a majority portion of the interest of that ocean common carrier being owned or controlled in any manner by a government, the ocean common carrier shall immediately send written notification of the details of the change to the Secretary of the Commission. If a carrier is newly commencing ocean common carrier operations in a United States trade, and if a majority portion of the carrier is owned or controlled by a government, or if a government may approve or disapprove the majority of directors or the chief executive or operating officer of the carrier, the carrier shall immediately send written notification to the Secretary of the details of such ownership or control.

§ 565.5 Exceptions.

All controlled carriers shall be subject to provisions of this part and section 9 of the Shipping Act of 1984 except those which meet the following exceptions:

(a) when the vessels of the controlling state are entitled by a treaty of the United States to receive national or most-favored-nation treatment; or

(b) when the controlled carrier operates in a trade served

exclusively by controlled carriers.

§ 565.6 Level of rates and charges generally.

No controlled carrier may maintain or enforce rates or charges in its tariffs or service contracts that are below a level that is just and reasonable. No controlled carrier may establish or maintain unjust or unreasonable classifications, rules, or regulations in its tariffs or service contracts. An unjust or unreasonable classification, rule or regulation means one that results or is likely to result in the carriage or handling of cargo at rates or charges that are below a just and reasonable level. See § 565.9(a)(2) (Rate standards).

§ 565.7 Effective dates.

(a) Generally. Except for service contracts, the rates, charges, classifications, rules or regulations of controlled carriers may not, unless the Commission has granted special permission, become effective sooner than the 30th day after the date of publication.

(b) Open rates. (1) Generally. Controlled carriers that are members of conference agreements publishing rates for commodities designated as open by the conference are subject to the 30-day controlled carrier notice requirement, except when special permission is granted by the Commission under § 565.8.

(2) Conference publication of reduced open rates.

Notwithstanding paragraph (b)(1) of this section, a conference may, on less than 30 days' notice, publish reduced rates on behalf of controlled carrier members for open-rated commodities:

(i) at or above the minimum level set by the conference; or

(ii) at ~~or~~ above the level set by a member of the conference that has not been determined by the Commission to be a controlled carrier subject to section 9 of the Shipping Act of 1984.

(c) Independent action rates of controlled carriers. Conferences may publish on behalf of their controlled carrier members lower independent action rates on less than 30 days' notice, subject to the requirements of their basic agreements and subject to such rates being published at or above the level set by a member of the conference that has not been determined by the Commission to ~~be~~ a controlled carrier subject to section 9 of the Shipping Act of 1984.

§ 565.8 Special permission.

Section 8(d) of the Shipping Act of 1984 authorizes the Commission, in its discretion and for good cause shown, to permit increases or decreases in rates, or the issuance of new or initial rates, on less than statutory notice under § 565.7. Section 9(c) of the Shipping; Act of 1984 authorizes the Commission to permit a controlled carrier's rates, charges, classifications, rules or regulations to become effective on less than 30 days' notice. The

Commission may also in its discretion and for good cause shown, permit departures from the requirements of this part. The Commission will consider such requests for special permission by controlled carriers pursuant to its procedures set forth at 46 CFR part 520.

§ 565.9 Commission review, suspension and prohibition of rates, charges, classifications, rules or regulations.

(a) (1) Request for justification. Within 20 days of a request (with respect to its existing or proposed rates, charges, classifications, rules or regulations) from the Commission, each controlled carrier shall file a statement of justification that sufficiently details the controlled carrier's need and purpose for such rates, charges, classifications, rules or regulations upon which the Commission may reasonably base its determination of the lawfulness thereof.

(2) Rate standards. (i) In determining whether rates, charges, classifications, rules or regulations by a controlled carrier are just and reasonable, the Commission shall take into account whether the rates or charges which have been published or assessed or which would result from the pertinent rates, charges, classifications, rules or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual or constructive costs.

(ii) For the purposes of § 565.9 (a)(2)(i), "constructive costs" means the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade.

(iii) The Commission may also take into account other appropriate factors, including, but not limited to, whether:

(A) the rates, charges, classifications, rules or regulations are the same as or similar to those published or assessed by other carriers in the same trade;

(B) the rates, charges, classifications, rules or regulations are required to assure movement of particular cargo in the trade;
or

(C) the rates, charges, classifications, rules or regulations are required to maintain acceptable continuity, level or quality of common carrier service to or from affected ports.

(3) Time for determination. The Commission shall determine within 120 days of the receipt of information requested by the Commission under this section, whether the rates, charges, classifications, rules or regulations of a controlled carrier may be unjust and unreasonable. Whenever the Commission is of the opinion that the rates, charges, classifications, rules or regulations published or assessed by a controlled carrier may be unjust and unreasonable, the Commission shall issue an order to the

controlled carrier to show cause why those rates, charges, classifications, rules or regulations should not be prohibited.

(b) Suspension. Pending a decision on whether to prohibit the rates, charges, classifications, rules or regulations of a controlled carrier, the Commission may suspend the rates, charges, classifications, rules or regulations. See § 565.10.

(c) Prohibition. The Commission shall prohibit the use of any rates, charges, classifications, rules or regulations that the controlled carrier has failed to demonstrate to be just and reasonable. In a proceeding under this paragraph, the burden of proof is on the controlled carrier to demonstrate that its rates, charges, classifications, rules or regulations are just and reasonable. The use of rates, charges, classifications, rules or regulations published or assessed by a controlled carrier that have been suspended or prohibited by the Commission is unlawful.

(d) Publication. All final orders of prohibition shall be published in the Federal Register.

§ 565.10 Suspension procedures and replacement rates.

(a) (1) Suspension prior to effective date. Pending a determination as to their lawfulness in a prohibition proceeding as described in § 565.9, the Commission may suspend the rates, charges, classifications, rules or regulations at any time before their effective date.

(2) Suspension after effective date. In the case of rates, charges, classifications, rules or regulations that have already become effective, the Commission may, upon the issuance of an order to show cause, suspend those rates, charges, classifications, rules or regulations on not less than 30 days' notice to the controlled carrier.

(b) Period of suspension. In any case, no period of suspension may be greater than 180 days.

(c) Implementation. (1) Upon issuance of an order suspending a rate, charge, classification, rule or regulation in whole or in part, the Commission shall direct the controlled carrier to remove the suspended material from its tariff publication; or

(2) if the matter subject to the suspension order is not covered by paragraph (c)(1) of this section, the Commission shall set forth procedures in the order for implementing the suspension.

(3) Publication. All orders of suspension shall be published in the Federal Register.

(d) Replacement rates. Controlled carriers may publish in tariffs or file in service contracts rates, charges, classifications, rules or regulations in lieu of the suspended matter ("replacement rates").

(1) Effective date. In the case of replacement rates which

are published in tariffs and which are scheduled to become effective during a suspension period, may become effective immediately upon either their publication in tariffs or upon the effective date of the suspension, whichever is later.

(2) Rejection of replacement rates. The Commission may reject the replacement rates, charges, classifications, rules or regulations published in tariffs or filed in service contracts to take effect during the suspension period if they are unjust and unreasonable. In determining whether to reject replacement rates, charges, classifications, rules or regulations, the Commission will consider whether they would result in total charges (i.e, rate plus applicable surcharges) that are lower than the lowest comparable charges effective for a common carrier, other than a controlled carrier, serving the same trade.

(3) At the same time it announces replacement rates, the controlled carrier shall submit to the Secretary of the Commission, a letter identifying the specific competing common carrier's rates, charges, classification or rules resulting in total charges which are equal to or lower than its own.

§ 565.11 Presidential Review.

The Commission shall transmit all orders of suspension or final orders of prohibition to the President of the United States concurrently with the submission of such orders to the Federal

Resister pursuant to § 565.9(d) or § 565.10(c)(3). The President may, within 10 days of either the receipt or effective date of the order, request in writing that the Commission stay the effect of the order for reasons of national defense or foreign policy.

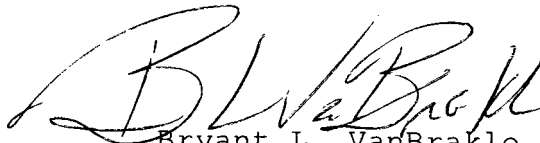
§ 565.12 Stay, postponement, discontinuance or suspension of action.

The Commission may, on its own motion or upon petition, postpone, discontinue, or suspend any and all actions taken by it under the provisions of this part. The Commission shall immediately stay the effect of any order issued under this part as requested by the President pursuant to § 565.11.

§ 565.13 OMB control number assigned pursuant to the Paperwork Reduction Act

The Commission has received OMB approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. The valid control number for this collection of information is 3072-0060.

By the Commission.


Bryant L. VanBrakle
Secretary